

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

T. STEELE CONSTRUCTION, INC.

and

Case 33-CA-14914

INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL 150, AFL-CIO

*Deborah Fisher, Esq., and  
Melissa Tomaska, Esq.,  
for the General Counsel.  
John F. Doak, Esq.,  
(Katz, Huntoon & Fieweger, P.C.),  
Moline, Illinois,  
for the Respondent.  
Robert E. Entin, Esq.,  
Countryside, Illinois,  
for the Charging Party.*

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Peoria, Illinois, on December 20 and 21, 2005. The International Union of Operating Engineers, Local 150, AFL-CIO (the Union), filed the original charge on June 10, 2005, and amended charges on July 14 and August 30, 2005. The Director of Subregion 33 of the National Labor Relations Board issued the complaint on August 31, 2005. The complaint alleges that T. Steele Construction, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) during an organizing effort when it: threatened to retaliate against employees for union or other protected activities; stated that it would refuse to hire an individual because he or she was a member of a union; interrogated an employee about union activities; and created the impression of surveillance of union activities. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) when it transferred and then discharged Joe Farrell, an employee who was working as an organizer for the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

## Findings of Fact

5

## I. Jurisdiction

10

The Respondent, a corporation, with an office and place of business in Rock Island, Illinois, has been engaged in the business of constructing cellular phone tower foundations and houses. In conducting these business operations it annually performs services valued in excess of \$50,000 in states other than the State of Illinois, and purchases and receives at its Rock Island facility, goods valued in excess of \$50,000 directly from points outside the State of Illinois. I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

15

## II. Alleged Unfair Labor Practices

A. Background Facts

20

The Respondent is a construction company that performs two basic types of work. One is building the sites and foundations for cellular phone towers and the other is building houses. During the relevant time period the Respondent had approximately 33 employees. Most of the workers were distributed among five or six phone tower crews, and one or two house building crews. The drill crews that performed tower work and the crews that built houses each generally had three or four members, including a foreman. The Respondent's president and owner is Thomas "Tom" Steele (T. Steele). T. Steele's brother-in-law, John Oliver (Oliver), is the Respondent's vice president.

25

30

The Respondent's phone tower work consists of digging or drilling the tower foundation, constructing the building foundation with underground lighting and conduits for utilities, installing electrical wires and meters for the structure, and building roads to sites that do not have adequate access. The phone tower work is generally performed out-of-state, and employees on the Respondent's tower crews are away from home overnight for a portion of most weeks. The heavy equipment used to complete the work includes caisson drills, excavators, skid steer loaders, bobcats, semi trucks, and crew trucks. The operation of this equipment is generally considered "operator's" work, and a commercial driver's license (CDL) is required to drive the semi trucks and the crew trucks.

35

40

The Respondent builds houses using a system referred to as "poly-steel." The poly-steel system involves stacking styrofoam forms and then filling those forms with concrete to create the walls of the house. The Respondent adds a floor deck, a basement, drywall, and shingles to the house. In addition, the Respondent performs some backfill and grading around the house site. Most of the Respondent's house building work is local, and the house crews are generally not required to be away from home overnight. The equipment used by the house crews includes excavators, dump trucks, skid steer loaders, crew trucks, concrete saws, shovels, hammers, and wheelbarrows.

45

B. Union Organizer Hired By Respondent

50

The Respondent's employees are not represented by a union. The record shows that it is not uncommon for the Respondent to employ persons who are current or former union members and that some such employees have worn clothing with union names or insignias to the Respondent's jobsites. However, prior to April 2005, none of those employees had engaged in a campaign to persuade other employees to organize for union representation. This changed

when Joe Farrell (Farrell), an organizer with the Union, began working for the Respondent on April 18, 2005.

The series of events that lead to Farrell's hiring and the alleged unfair labor practices began in late March or early April 2005, when the Respondent placed four help-wanted advertisements. In those advertisements, the Respondent stated that it was seeking: (1) "Operators" with "excavator and skid-steer" experience; (2) "Drivers/Laborers" with a "Class A CDL [Commercial Driver's License]"; (3) "Carpenters," "CDL a plus"; and, (4) "Concrete Finishers/Laborers," "CDL a plus," "[m]inimal concrete experience." The Respondent stated that weekly travel was a requirement for the operator positions, the driver/laborer positions, and some of the concrete finisher/laborer positions.

Farrell applied for the operator position, and met the qualifications for that job. In the resume he sent to the Respondent, Farrell stated that he had experience as a truck driver, equipment operator, and mechanic, and that for the last 15 years he had run his own construction business. He had a CDL and experience operating excavators and skid steers. Farrell made no mention of his employment as a union organizer. On Friday, April 15, T. Steele and Oliver interviewed Farrell. They described the types of work the company did, and asked Farrell if he was available for work out-of-town. Farrell answered that working out-of-town would "not be a problem" for him. Farrell was told to report to work the following Monday, April 18. T. Steele told Farrell that the Respondent was "flat-out swamped" and that Farrell would be placed on a drill crew – one of the types of tower crews – because that crew was lacking experience and needed someone with supervisory background. Farrell was assigned to replace Dennis Peterson (Peterson), who was resigning his position in order to begin work as an operator for a union contractor. The Respondent was unaware that Farrell was a union organizer at the time it hired him.

At approximately the same time as the Respondent hired Farrell, it hired three other individuals who had responded to the help-wanted advertisements. Two of those individuals had applied for positions as laborers, and one had applied for a position as a carpenter. Aside from Farrell, no one was hired who had applied for an operator position. The new employees were not provided with job descriptions or told that they would be performing exclusively the type of work described in the advertisements to which they had responded.

On Monday, April 18, Farrell began work as an operator on one of the Respondent's tower crews. The foreman of the crew was Kristian Anderson (Anderson), and the other crew members were Mike Barnewolt (Barnewolt) and, until April 19, Peterson. While Farrell was on that crew from April 18 to April 21, Anderson assigned him to, inter alia, prepare the caisson drill for operation and transportation, operate a skid steer, and drive a semi-truck and a crew truck. During his first week, Farrell worked an average of about 13 hours a day for a total of 52.5 hours over the 4 days that he was scheduled to work.

On the second day of his employment, April 19, Farrell began to tell co-workers that he was a union organizer. First he told Peterson, and later that day he told Barnewolt. Farrell also gave Barnewolt a copy of the Union's standard contract and described the Union's healthcare plan to him. The next day, April 20, Farrell told Anderson that he was a union organizer, discussed concerns that Anderson had about his working conditions, and offered to provide Anderson with a copy of the Union's standard contract. Word of Farrell's role as a union organizer spread quickly among the Respondent's personnel. During Farrell's first week of employment, Oliver informed T. Steele that Farrell was a union organizer. Later that week, Farrell asked T. Steele to avoid scheduling him on Friday, April 22, so that he could attend union organizing school. T. Steele believed there was no work for Farrell to perform on April 22,

and he granted Farrell's request. Although, Farrell was off work on April 22, he came to the Respondent's office briefly to complete application materials that called for somewhat more detailed information regarding his background. In these materials, Farrell stated that his construction business involved "concrete work" -- the first time that any of the documents regarding Farrell's application made mention of experience with concrete.

C. Respondent Reassigns Farrell to House Crew

During the following weekend, after it discovered that Farrell was a union organizer, the Respondent told Farrell that he was being reassigned to a house crew under the supervision of foreman Brian Brink (Brink). As the foreman of the crew, Brink's authority included directing employees' work, issuing some types of discipline, and helping decide when employees could schedule leave. The record shows that Brink had a negative view of unions and union organizers and that T. Steele, who made the decision to reassign Farrell, was aware of those views. According to Brink's own testimony, before seeing Farrell work, or even meeting the new employee, Brink concluded that the Respondent had made a mistake by hiring Farrell because he was a union organizer. It was Brink's opinion that union organizers brought conflict to a workplace, and were not "not there to work." When he found out that Farrell was being assigned to his crew, Brink, who still had not met Farrell, formed "an impression" that Farrell would engage in divisive tactics and that things might not work out. On April 20, before Farrell started work on Brink's crew, Brink told one of his crew members, Thomas "Tom" Hall (Hall), and possibly others, that T. Steele had made a mistake by hiring the union organizer. The record shows that Brink held these beliefs even though he had never previously worked with a union organizer or at a facility where an organizing campaign was underway. His negative impressions about working with Farrell were not, Brink said, based on "past experience," but rather on what he termed "an educated opinion." On more than one occasion, T. Steele found it necessary to tell Brink to keep his views about unions to himself.

The record shows that T. Steele also formed a negative impression of what to expect from Farrell once he discovered that Farrell was a union organizer. As of the time that Farrell's union role became known, T. Steele admits that Farrell was doing a fully satisfactory job for the Respondent. Nevertheless, T. Steele testified that when he found out that Farrell was a union organizer he became "very nervous" and "frightened for the livelihood of the business." T. Steele testified that when he found out about Farrell's connection to the Union he "knew" that one of two things would happen -- either Farrell "would succeed in organizing the company, or two, we were going to be sued." T. Steele stated that, in his view, Farrell was subject to discharge as soon as the Respondent discovered that he was a Union organizer, since Farrell had not disclosed this information when applying and lying on your application is cause for termination. T. Steele testified that, nevertheless, he chose not to discharge Farrell at that time and told his foremen to "be cautious," and "keep their comments to themselves."

During Farrell's first week of work, T. Steele had a conversation with Brink about Farrell. Brink told T. Steele, "[P]ut him on my crew, I can run him off." Brink's end of the conversation was overheard by Shawn Fuller (Fuller), a member of Brink's crew.<sup>1</sup> Fuller was only about three feet from Brink when this statement was made. After Brink completed the phone conversation, he told Fuller that he had been speaking to T. Steele and that Farrell was a union organizer.<sup>2</sup>

<sup>1</sup> Hall was working at the same jobsite, but the evidence is inconclusive as to whether Hall overheard Brink's conversation

<sup>2</sup> This account of Brink's statement during the telephone call, and his comments afterward, is based on the testimony of Fuller, who I found to be a very credible witness. He took the stand for the General Counsel under subpoena, and after confiding to T. Steele that he had reservations about testifying. He had a calm and credible, although somewhat reticent, demeanor, and did not appear to be straining to provide testimony to benefit either side. He was not shown to be a union member or supporter, nor was there evidence that he had any other bias or personal interest in the outcome of this matter. My credibility findings with respect to Fuller are made independently of the fact that he was still working for the Respondent, and on Brink's crew, at the time he testified. I nevertheless note that these findings are consistent with the Board's view that the testimony of a current employee that is adverse to his employer is "given at considerable risk of economic reprisal, including loss of employment ... and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977); see also *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996) (Table).

Hall testified that Brink had a telephone conversation in his and Fuller's presence. Although Hall's account of what Brink said was generally consistent with Fuller's, Hall reported that Brink used somewhat harsher language. I believe Fuller's account to be more reliable than Hall's. Hall actively supported the Union during the organizing campaign, and at the time he testified was receiving strike pay from the Union arising from a dispute between himself and the Respondent. While testifying, Hall had very watery eyes and appeared either to be suffering from a bad cold or to be minimally impaired in some other way. He was an unusually restless witness, although this behavior did not become appreciably more pronounced when he was being challenged about disputed matters. Based on my observation of Hall, and the record as a whole, I believe that Hall was a somewhat credible witness, but not very reliable regarding disputed matters.

Brink denied that he had a conversation in Fuller's or Hall's presence during which he suggested that Farrell be transferred to his crew and "run off." Based on Brink's demeanor, testimony, and the record as a whole, I conclude that Brink was a considerably less credible witness than Fuller, and only about as reliable as Hall. First, Brink's bias against unions and union activity was apparent. Before he had ever worked with Farrell, or any other union organizer, Brink concluded that it was a mistake to hire a union organizer, and he espoused that view to Hall and perhaps other supervisees. Although Brink claimed he was "pretty neutral" on the subject of unions, his demeanor was palpably hostile when testifying about them, and he repeatedly stated negative impressions about unions and organizers. He originated the nickname "Union Joe" for Farrell. He also made crude and disparaging reference to Farrell's union activity, telling Hall that Farrell "probably . . . got Local 150 tattooed on his dick." More than once, T. Steele found it necessary to advise Brink to keep his opinions regarding union matters to himself. It was also apparent that Brink exaggerated to provide testimony favorable to the Respondent. To site just one example, in an effort to explain Farrell's termination, Brink claimed that he had disciplined Farrell "many times" in addition to the one documented incident. However, when pressed, Brink conceded that he could recall only a single instance of undocumented discipline. On that occasion, Brink said, he had told Farrell not to use his cell phone during work time, and there was never a problem with Farrell doing so again. Tr. 324-27, 347-48. Based on the testimony, and the record as a whole, I credit Fuller's testimony over

Continued

The Monday after T. Steele's telephone conversation with Brink,<sup>3</sup> T. Steele transferred Farrell to Brink's crew.

Farrell remained on Brink's crew until T. Steele discharged him 7 weeks later, on June 10. During the time that Farrell was on Brink's crew, he performed laborer's work almost exclusively. The assignments that Brink gave to Farrell included working with hammers, shovels, scrappers, and wheelbarrows, and performing tasks such as tying up rebar, and digging "crumbs" out of a ditch. There was a substantial amount of operator work performed by Brink's crew, but Brink virtually never assigned that work to Farrell.

T. Steele testified that he transferred Farrell from Anderson's crew to Brink's crew after the "crunch" on Anderson's crew was over. However, the evidence shows that, contrary to T. Steele's claim, there continued to be far more work on Anderson's tower crew than on the house crew to which Farrell had been moved. Prior to the transfer, Farrell had worked 52.5 hours over the course of his 4 days on Anderson's crew. Employees who remained on Anderson's continued to work long hours and earn overtime -- consistently working more than 50 hours a week, and sometimes over 60 hours a week. On the other hand, after being transferred to Brink's crew, Farrell never again worked even 40 hours a week, and usually worked far less. Indeed, during one week he worked a total of only 7.25 hours, and during another week he worked a total of only 14.25 hours. Of the employees who the Respondent hired in response to the March/April help-wanted advertisements, only Farrell had applied for the type of operator work that Farrell was performing when he replaced Peterson on Anderson's tower crew. The Respondent does not explain how the "crunch" precipitated by Peterson leaving the tower crew was relieved the following week. Farrell's reassignment was out of the ordinary for the Respondent. Normally when employees were assigned to tower crews they stayed on tower crews, helping out only occasionally with other types of work.

In addition to claiming that the "crunch" on Anderson's crew was over, T. Steele testified that Farrell's transfer was motivated by the need on Brink's crew for an employee skilled as a concrete finisher. The evidence showed, however, that Brink himself was a concrete finisher and that crew-member Fuller also had skills as a concrete finisher. Brink testified that the transfer occurred after he requested that an employee with a CDL be assigned to his crew, and that he knew Farrell had a CDL. However, Brink did not recall ever asking Farrell to perform work that required a CDL after the transfer was made.

During the period that he was assigned to Brink's crew, Farrell continued his union activities. On April 27, he began distributing union authorization cards to the Respondent's

Brink's regarding disputed matters.

<sup>3</sup> I base the finding that the conversation Fuller overheard was between Brink and T. Steele, on Brink's contemporaneous statement to Fuller, in which he identified T. Steele as the person to whom he had been speaking. The Respondent did not interpose an objection to this testimony, and I note, in any case, that Brink is an agent and supervisor of the Respondent and that his statement is the admission of a party-opponent, not hearsay. Federal Rule of Evidence 801(d)(2); see also *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), *enfd.* 26 Fed. Appx. 435 (6th Cir. 2001) (hearsay objection waived when testimony received without objection). Moreover, Brink's statement has adequate circumstantial guarantees of reliability. Brink identified T. Steele contemporaneously with the telephone conversation and the record suggests no reason why Brink would have wanted to misinform Fuller about T. Steele's participation. In addition, within days of the conversation, T. Steele actually did reassign Farrell to Brink's crew.

employees, and he handed out a total of about 5 such cards during his tenure with the Respondent. From April 27 until the time of his discharge, Farrell wore clothing with the Union's name written on it to work each day. Farrell gave such clothing to Hall, and Hall began wearing it to work as well. On April 28, Farrell began driving to work in a car with a bumper sticker in the back window that read "*Defend your right to bear Union Cards.*" On May 31, Farrell handed out pro-Union literature to employees as they arrived prior to the start of work -- an activity that Brink witnessed. Farrell talked to at least 10 employees about what he characterized as the benefits of union membership. On June 6, Farrell made a report to the Occupational Safety and Health Administration (OSHA) in which he asserted that there were safety problems at the Respondent's Geneseo, Illinois, jobsite. In a June 9 letter to T. Steele, Farrell identified himself as the source of that report, and stated that he had other alleged safety concerns about the Respondent's operation. T. Steele agreed to meet with Farrell on June 10 about those concerns. As is discussed below, it was at that June 10 meeting that T. Steele terminated Farrell.

#### D. Statements by Brink During Union Campaign

T. Steele repeatedly told Brink to keep his opinions to himself, yet Brink made multiple hostile comments to crew members about Farrell and the union activity prior to Farrell's discharge. As stated above, during the first week of Farrell's employment, Brink volunteered, in the presence of at least one crew member, to "run [Farrell] off" the job. He told Hall, and possibly others, that T. Steele had made a mistake by hiring a Union organizer. In mid-May, Brink had a conversation with Fuller and Hall in which he told them that any employee who signed a union card "would be fired." Hall responded that there was no way to find out who signed a card. Brink stated that "there was ways of finding" out which employees "did or did not" sign. On another occasion that same month, Brink told Fuller and Hall that before "T. Steele . . . was to go union," he would "sell his drill . . . and just build houses." Also in mid-May, Brink asked Fuller whether Farrell had given him "the union speech." Brink posed this question to Fuller at a jobsite, but out of the presence of other employees. Fuller recorded some of Brink's statements on a notepad when he got home in order to help himself remember them.

Hall testified about another incident, on April 27, when he says Brink made hostile comments regarding union apparel. According to Hall, when Brink saw that he was wearing union apparel, Brink commented "Why do you not walk in the office and see how they appreciate [you] wearing those clothes," and that if Hall wore any more Union "garb" he "might as well join them." Hall also testified that Brink once commented "Nice hat and sweatshirt," in reference to the Union hat and sweatshirt that Hall had on. According to Hall, he told Brink, "Yeah it was free," and Brink responded "No, it is going to cost you." Brink was not asked specifically about these alleged comments, but did make a general testimonial denial that he did anything to discourage employees from wearing union apparel. He also denied that he said anything to Hall and Farrell "about reprisals that may be taken with regard to wearing . . . clothing [with union insignias]." Based on the record, and my assessment of the credibility of the witnesses, see, supra, footnote 2, I believe it is possible that Brink made the comments about union clothing that Hall testified to. On the other hand, I found Hall and Brink to be equally unreliable as witnesses regarding disputed matters. In the absence of any evidence significantly corroborating either witness regarding this exchange, I do not believe the General Counsel has shown that Brink more likely than not made the alleged threats to Hall about union apparel.

E. Farrell Meets with Tami Kuhlenbeck

5 Tami Kuhlenbeck (Kuhlenbeck) has responsibility for the Respondent's human resources functions and is also T. Steele's sister-in-law. On the morning of Friday, June 3, Farrell and Hall met with her. Farrell asked Kuhlenbeck if he could take a week of unpaid leave in August – approximately 2 months later – to participate in a church mission. Kuhlenbeck responded that it was an "awful busy time of year" and she would have to "check into it." Farrell  
10 said that, if necessary, he could "line up somebody else, to take my place." Kuhlenbeck responded, "oh, no, we are not going to hire another union -- another union worker," and that the Respondent was "a non-union shop."<sup>4</sup> The Respondent has admitted that Kuhlenbeck is an agent of the company.

F. Respondent Discharges Farrell

15 After requesting the opportunity to discuss his safety concerns, Farrell had a meeting with T. Steele, Oliver, and Kuhlenbeck on June 10. Farrell and T. Steele talked about Farrell's safety concerns, and Farrell's contact with OSHA, and Farrell presented some jobsite  
20 photographs showing what he said were safety problems. T. Steele stated that he appreciated Farrell bringing the concerns to his attention, and also stated that he did not understand why Farrell did not discuss them with him before contacting OSHA. Farrell offered T. Steele a copy

---

25 <sup>4</sup> I credit Farrell's account of Kuhlenbeck's response to his offer to find a replacement worker. Farrell testified in a very measured, certain, manner. His testimony was free of meaningful contradictions and he was not impeached by documentary evidence or the testimony of disinterested witnesses. In addition, Farrell's account of Kuhlenbeck's response was corroborated by the testimony of Hall. Although, as discussed earlier, I do not consider Hall  
30 a fully reliable witness, his corroborating testimony lends some credence to Farrell's account. I have also considered the fact that Farrell, as an employee of the Union who was attempting to organize the Respondent, was not a disinterested witness in this proceeding. However, based on Farrell's demeanor and testimony, and the record as a whole, I conclude that he was a generally credible witness.

35 Kuhlenbeck recounted a different version of her response to Farrell's request on June 3. Like Farrell, she testified in a measured, certain, manner. Also like Farrell, she was not a disinterested witness given her position as the Respondent's human resources official and her familial relationship to T. Steele. Unlike with Farrell testimony, however, an important contradiction was demonstrated during Kuhlenbeck's testimony regarding the meeting she had  
40 with Farrell and Hall. Kuhlenbeck's testimony was that, when Farrell offered to find a replacement worker, her response was, "[W]e do not hire employees from the hall." However, in notes that she herself made shortly after the meeting, and placed in Farrell's personnel file, Kuhlenbeck recorded a completely different response: "We are not a union shop. We do not hire temp employees." These notes actually corroborate part of Farrell's account and contradict  
45 Kuhlenbeck's own. I also note that the evidence indicates that Kuhlenbeck treated Farrell more harshly than other employees. She indicated that Farrell had to provide a doctor's note in order to be excused for his 1-day medical absence, but she did not ask for such documentation from other employees who were out for medical reasons for considerably longer periods of time. The Respondent's employee handbook states that a doctor's note "may be required" after sick leave  
50 of "two or more consecutive sick days," and does not provide that the Respondent may request such a note to excuse an absence when, like Farrell, the employee is out for only 1 day. General Counsel's Exhibit (GC Exh.) 14, Page 14. Based on my assessment of the demeanor of the witnesses and the record as a whole, I credit Farrell's account over Kuhlenbeck's regarding what was said at the June 3 meeting.

of the Union's standard memorandum of agreement, but T. Steele refused to take it. Farrell asked if T. Steele would sign the agreement, and T. Steele said that he was not interested in entering into the contract. Then T. Steele told Farrell that he was going to "have to let [him] go." He stated that when Farrell had first started work he had done a good job, but that Brink said his performance was slipping. T. Steele said that this was what the Respondent's 90-day probationary period was for.<sup>5</sup> T. Steele also commented that the Respondent had a lot of work coming up, and needed someone who would get the work done. The Respondent did not present evidence showing that the decision to terminate Farrell on June 10 had been made prior to that day, or even prior to Farrell's presentation at the meeting.

Poor performance was the only reason T. Steele gave on June 10 for discharging Farrell, but at trial he testified that the decision was also based on Farrell's attendance. Kuhlenbeck, the Respondent's human resources official, stated that her understanding was that Farrell's attendance record had nothing to do with the decision to terminate him, and that he was terminated solely based on his performance.

### 1. Farrell's Performance

The testimony included general assessments of Farrell's performance, and also discussions of four specific instances relied upon by the Respondent to justify Farrell's discharge. Hall, who worked with Farrell on Brink's crew, testified that Farrell was "an excellent worker." According to Hall, Farrell was "very knowledgeable" and was "the first on the job and the last one to leave." Hall testified that he had never noticed Farrell slowing down his work pace. The Respondent does not dispute that Farrell's performance was acceptable during the first few weeks of his employment. T. Steele characterized Farrell as an "average" employee during his first week. Shortly after Farrell was transferred, Brink told T. Steele that Farrell was doing a "nice job." Similarly, Brink told Hall that Farrell was a "good worker." However, according to T. Steele, Farrell soon began to slow his work pace, disrupt the crew, and use his cell phone excessively during work time. T. Steele conceded that he only observed Farrell's work during the first week of Farrell's employment, and therefore did not personally observe any of the poor performance upon which the discharge decision was putatively based. Rather, T. Steele testified that he based his opinion that Farrell's performance had deteriorated on reports from Brink and, to a lesser extent, from Joseph Kuhlenbeck (J. Kuhlenbeck), who observed Farrell at jobsites on two or three occasions. J. Kuhlenbeck, in addition to being a supervisor for the Respondent, is T. Steele's nephew.

Brink testified that there was a negative change in Farrell's work pace, but he was unable to describe or quantify that change in pace other than to say it was "very apparent" "to everyone."<sup>6</sup> Brink did, however, discuss two specific instances of problems. In one instance, Farrell spoke to a union representative named Marshall Douglas while at a jobsite and during work time. Brink told Farrell he should concentrate on the work and that "if he needed to speak

---

<sup>5</sup> At trial, T. Steele testified that the only provisions of the employee handbook that do not apply during an employee's probationary period are those relating to employee benefits such as health insurance, the company's 401(K) plan, holidays, and so forth. All other provisions in the handbook -- including those regarding both progressive discipline and those regarding at-will employment -- are equally applicable during the probationary period and the post-probationary period. Tr. 59-60, 470-71; GC Exh. 14.

<sup>6</sup> Brink, did not specifically deny Hall's testimony that Farrell was "always the first on the job and the last one to leave."

with Mr. Douglas, he could do that on his own time.” Brink testified that after he discussed the matter with Farrell, he never saw Farrell engage in the conduct again. In the second instance, Brink noticed Farrell talking on his cell phone during work time. Brink testified that he informed Farrell that “personal calls were to happen, you know, on your lunch break or on a break.” Brink testified that after this conversation, there was never a problem with Farrell using his cell phone during work time again.

J. Kuhlenbeck testified about an occasion when the truck he was operating became disabled at a jobsite where Farrell and Hall were present. J. Kuhlenbeck stated that Hall and himself worked under the truck for about 25 or 30 minutes and completed the repair. According to J. Kuhlenbeck’s testimony on direct examination, Farrell was “just kind of standing there watching us, not really lending a hand.” J. Kuhlenbeck did not ask Farrell to help, but stated that his expectation in such circumstances was that an employee would “jump right in and start helping.” On cross-examination, J. Kuhlenbeck conceded that there was only room for two employees to work under the truck and that since he and Hall were already there, Farrell could not participate directly in the repair. J. Kuhlenbeck also admitted that while he and Hall were working, Farrell was offering them advice on how to accomplish the repair. J. Kuhlenbeck allowed that from his vantage point under the truck, he could not be sure that Farrell was not assisting Brink during some of the period when the repair was being made. J. Kuhlenbeck testified that he did not tell T. Steele or anyone else at the Respondent about this incident and never recommended that Farrell be disciplined for it. Based on his demeanor, testimony, relationship to T. Steele, and the record as a whole, I conclude that J. Kuhlenbeck did not testify about this episode in an unbiased manner, but rather tried to slant his account in an effort to assist the Respondent’s case.

The fourth example of Farrell’s alleged poor performance was testified to by Lawrence Steele (L. Steele), who is T. Steele’s brother and an employee of the Respondent. On the occasion in question, the crew was building a house in Geneseo, Illinois, in late April or early May 2005. Styrofoam forms were stacked in the shape of the house’s walls and L. Steele was present to operate a concrete pump truck that would deliver concrete into those forms. L. Steele was at the site for approximately 3 or 3 1/2 hours. Once the pumping of concrete started,<sup>7</sup> L. Steele operated the pump truck and Brink maneuvered the hose from which the concrete flowed. According to L. Steele, it was Hall’s and Farrell’s role during this process to walk around the building and check to make sure that seams were not separating and otherwise help prevent the concrete that was being poured from breaching or “blowing out” the styrofoam forms. In addition, Hall and Farrell were expected to use a vibrating device and also to tap the walls to help the concrete flow evenly through the styrofoam forms. They also had responsibility for making adjustments to the braces that were used to keep the walls straight. On direct examination by the Respondent’s counsel, L. Steele claimed that Hall and Farrell “just stood around and talked” instead of doing the tasks that were expected of them. However, on cross examination, L. Steele stated that he is sure that Hall and Farrell must have operated the vibrators while the concrete was being poured because that is required on every job of this kind. L. Steele stated further that whenever Brink directed Hall and Farrell to perform any work, they did everything Brink demanded, and that it was common for Brink to give direction to laborers on his crew. L. Steele conceded that during the incident at-issue his attention was focused on Brink, not on Hall’s or Farrell’s activities. Based on his demeanor, testimony, relationship to T.

---

<sup>7</sup> Before the concrete pumping started, Hall said he was feeling ill and asked if someone would transport him to the off-site portable toilets that the employees used. After at least one other individual at the jobsite refused to take Hall, Farrell did so. Hall and Farrell returned to the jobsite within minutes after leaving.

Steele, and the record as a whole, I conclude that L. Steele was not an unbiased witness, but, like J. Kuhlenbeck, was shading his testimony in an effort to buttress the Respondent's position. At any rate, L. Steele did not testify that he ever reported the incident to anyone prior to Farrell's termination, and T. Steele did not claim that his decision to terminate Farrell was influenced by any report he received from his brother. Indeed, the Geneseo work occurred early in Farrell's tenure, most likely during the period for which the adequacy of Farrell's work performance is not in dispute.

Farrell also testified about the work at the Geneseo site. He stated that while the concrete was being poured into the walls, he was, checking for leaks, making sure the braces were tight, and also using the vibrator on the walls. According to Farrell, at times he was working right beside L. Steele on a scaffold. When asked what he was doing while the concrete was being pumped, Farrell commented, somewhat flippantly, that he and Hall were "Trying to keep clear of the hose so we didn't get splattered with concrete." When asked whether he was "standing around" while the concrete was being poured, Farrell answered "not that I remember," rather than definitively denying such behavior. I conclude that Farrell's testimony regarding this specific incident is not particularly reliable given the flippancy and lack of certainty of some of that testimony.

The record shows that prior to Farrell's discharge, T. Steele never mentioned to Farrell that there were shortcomings in the pace or quality of his performance, and certainly did not discipline Farrell for performance problems. Similarly, although Brink had authority to issue discipline to the workers on his crew, he never disciplined Farrell for poor performance or advised him that he was slowing down the work. Brink frequently told Farrell to work faster, but the record shows that Brink told everyone on his crew to work faster on occasion. The Respondent does not assert that Farrell lacks the skills to perform the necessary tasks or that the work he produced was not of adequate quality.

Although Farrell was never disciplined for poor performance, his personnel file contains a record that Tami Kuhlenbeck made of negative comments that T. Steele told her he received from Brink. According to that record, on May 18: "Tom Steele said Brian Brink called to complain about Joe Farrell's work performance. Brian said he was slowing down." Kuhlenbeck also recorded that, on May 31: "Brian B[rink] complained to Tom Steele again about Joe's performance. He said Joe's bringing the pace down of his other workers." Lastly, Kuhlenbeck recorded that, on June 3, "Brian asked Tom to remove Joe from his crew."<sup>8</sup> Kuhlenbeck testified that this type of record was not kept for other employees. T. Steele conceded that he frequently receives complaints from foremen about other employees, but that, unlike with Farrell, he did not have Kuhlenbeck document those complaints in the employees' personnel files. In Farrell's case, T. Steele testified, he had been advised to "document, document, document" because Farrell was union organizer. T. Steele stated that the Respondent had gone to lengths in documenting matters relating to Farrell that it had not with any other employee. Nevertheless, T. Steele chose not to document positive comments that he received about Farrell's performance – for example, Brink's report that Farrell was doing a "nice job."

---

<sup>8</sup> Brink testified that this was not a request or recommendation that Farrell be terminated.

## 2. Farrell's Attendance

Although the record raises significant doubts about T. Steele's assertion that Farrell's attendance was taken into account at the time of the discharge, I considered the evidence relating to Farrell's attendance record.<sup>9</sup> Farrell was absent on four occasions over the course of the 8-week period that he worked for the Respondent. The first time was April 22, the Friday after he was hired. Farrell asked T. Steele in advance if he could take that day off to attend a union training program. T. Steele agreed, and testified that there was no work for Farrell to perform that day. In Farrell's personnel file, this was recorded as an "excused absence." On May 16, Farrell was absent to attend a funeral. He obtained Brink's approval for this absence 2 days in advance. The Respondent did not initially make a record of this excused absence in Farrell's file, but Kuhlenbeck added a notation about it much later -- some time after June 3 -- in which she incorrectly noted the date of the absence as May 15, rather than May 16.

The next time Farrell was absent from work was May 25, when he attended a meeting. Approximately 15 minutes before the end of the work day on May 24, Farrell informed Brink that he needed May 25 off. Brink told Farrell that employees had to give at least 24 hours notice and that this was "spelled out" in the employee handbook. Brink gave Farrell a verbal reprimand for this supposed violation of the handbook policy, and the reprimand was recorded in Farrell's personnel file. This verbal warning is the only recorded discipline that the Respondent issued to Farrell prior to terminating him.<sup>10</sup> Contrary to Brink's statement to Farrell,

<sup>9</sup> Based on his demeanor and testimony, and the record as a whole, I did not find T. Steele to be a very credible witness regarding disputed matters. It was apparent that he allowed his personal stake in this matter to affect his candor. For example, he attempted to explain why Farrell's performance dictated that he be terminated in part based on Farrell's request for a week of unpaid leave to attend a church mission. Tr. 458-59. However, T. Steele admitted that he was not even sure he was aware of that leave request at the time he discharged Farrell, and that it played no actual part in the termination decision. Tr. 444. Initially, T. Steele testified that he had personally observed Farrell's performance after the first week of Farrell's employment, Tr. 88, but he later admitted that he had never observed Farrell's work performance after the first week and that he based his negative assessment entirely on reports from Brink and J. Kuhlenbeck, Tr. 454-55. T. Steele claimed that he terminated Farrell for slowing down the work by, inter alia, talking on his cell phone and he claimed to have observed this cell phone use "just about any time I was on a jobsite where Joe was at." Tr. 64. However, as discussed above, T. Steele never observed Farrell during the period of Farrell's alleged slow-down, but only during the early period when he admits that Farrell's work was satisfactory. Tr. 88. Initially, T. Steele claimed that Farrell was terminated for poor work performance and "missing frequently," Tr. 60, but after he was confronted with evidence about employees who were retained despite being absent more frequently than Farrell, Tr. 66 ff., T. Steele shifted his position and claimed that the problem was not the frequency of Farrell's absences, but that he was absent at "inopportune times" -- that is, he picked days when the Respondent "really needed the body." Tr. 83-84. Then, when discussing Farrell's missed days, T. Steele admitted that there was no work for Farrell to perform when he was absent on April 22. Tr. 82-83, 84-85.

<sup>10</sup> The record does not establish that the Respondent consistently adheres to a system of progressive discipline. The Respondent's employee handbook states a commitment to a progressive discipline system, but does not describe that system in any detail. T. Steele testified that he believes the Respondent tries to begin with a verbal warning, then impose a written warning, then a suspension, and then termination. He testified, however, that the Respondent "do[es] not adhere to it, as well as we should." Kuhlenbeck testified about five individuals who had been discharged, but who she "did not believe" had received any prior

Continued

the employee handbook contains no mention of a 24-hour notice requirement for absences.

The only notice period set forth in the handbook states that when an employee will be absent for unforeseen circumstances, the employee must inform his or her supervisor "at least 60 minutes before normal reporting time." It is undisputed that Farrell gave his notice more than 60 minutes before his normal reporting time. T. Steele did not corroborate Brink's statement that there was a 24-hour notice rule, but did state that, regardless of the language in the employee handbook, he "likes" employees to give their supervisors notice immediately upon discovering that they will be absent. Brink did not claim to be aware of T. Steele's "immediate notice" preference, and the Respondent does not claim that it was ever communicated to employees. At any rate, Brink could not have known whether Farrell gave immediate notice since Brink admitted that he was not sure when Farrell himself found out that he would have to be absent. At trial, Brink initially claimed that he had disciplined two other employees (Tom Hall and Steve Stanley) for the same reason as he did Farrell, but the record shows that those employees, unlike Farrell, were absent during periods for which they had given no notice at all.

Farrell's last absence prior to being terminated was on June 3. On that occasion, Farrell called Brink's cell phone more than an hour before normal starting time and left a message explaining that he was having problems with his back and was going to visit a doctor for treatment. Brink did not respond to Farrell's message. Farrell went to a doctor that day and did not appear for work. The next work day was Monday, June 6. Farrell returned to the job and Brink almost immediately confronted him to demand that Farrell produce a doctor's note regarding the 1-day absence. Farrell agreed to provide such a note. Later that same day, Brink asked Farrell for the doctor's note again, and Farrell inquired whether he could leave work early in order to visit the doctor's office to obtain it. Brink said that Farrell should call the doctor's office and have them send the note to the Respondent's office by facsimile. Farrell called his doctor's office during the lunch break in an effort to comply, but the doctor was unavailable and Farrell left a message. Later that day, Brink approached Farrell a third time to tell him that "we needed to take care of this issue, that we needed, you know, something from the doctor stating that he was okay to work." Although Brink approached Farrell three times in one day to demand a doctor's note, Brink conceded that he had never before demanded such a note unless the employee had filed a worker's compensation claim.

That same day, Farrell and Hall went to speak to Kuhlenbeck.<sup>11</sup> Kuhlenbeck asked Farrell whether he had obtained a doctor's note so that the 1-day absence would not be unexcused. When Farrell answered "no," she suggested that he "have it faxed in." Farrell explained that he had tried to do that without success. He said that he could obtain a note from the doctor at his next appointment, but also stated that he would have to check with his attorney about providing the note to the Respondent. Kuhlenbeck told Farrell that it would be acceptable if he obtained the note during his next visit to the doctor and provided it to the Respondent at that time. The Respondent's employee handbook states that a doctor's note may be required for medical absences of 2 or more days, and does not state that such a note may be required to excuse a medical absence of only 1 day. In other instances, the Respondent did not require employees to supply doctor's notes even after they had been absent for medical reasons for significantly longer periods of time than Farrell. The Respondent does not offer any nondiscriminatory explanation for why it deviated from its policy and practice when it came to

verbal or written reprimands. Brink testified about two individuals who he believed had received formal warnings. The record shows that at least one other individual received a written warning prior to being terminated.

<sup>11</sup> Other aspects of the same June 3 encounter between Farrell and Kuhlenbeck are discussed above.

Farrell's 1-day absence for medical reasons.

5 Evidence was presented about the attendance of other employees -- including a number  
 who were retained despite having attendance records that were equivalent to, or worse than,  
 Farrell's. Daniel A.<sup>12</sup> was eventually terminated for poor attendance, but was permitted to  
 continue working after he was absent six times, including one "no show," during his first 7 weeks  
 10 of employment with the Respondent. Jeff B. was allowed to continue working even after he was  
 out sick on five separate occasions, and took an additional week off, all during his first 3 months  
 of employment. He called in sick for a total of eleven days over his 7 months of employment  
 before the Respondent terminated him. Jim S. was allowed to continue working even though he  
 15 was absent three times during his first 2 weeks of employment with the Respondent, including  
 twice to care for his pet snake. The Respondent retained Jim S. even after he was absent two  
 more times the following month, and did not terminate him until he insisted on additional time off  
 that the Respondent had explicitly refused to authorize. Adam R. was retained even after he  
 was absent five times during his first month of employment. Three of those absences were "no  
 shows," and on the two other occasions he called in sick. He was terminated only after he had  
 20 additional absences during the subsequent weeks. Troy F., an employee with less than 1 year  
 of service, was retained even though, over the course of 7 months, he was absent for all or part  
 of 15 days, in addition to taking a 2-day vacation. This employee was eventually terminated, but  
 only after the Respondent issued him a written disciplinary warning and discovered that he had  
 forged a doctor's excuse. Julio B. continues to work for the Respondent even though, during his  
 25 first 5 months of employment, he was absent for 2 weeks while incarcerated, absent 3 days for  
 court appearances, and absent for medical reasons on two additional days. There was also  
 general testimony from Kuhlenbeck about other individuals who were terminated for what she  
 described as attendance or performance problems, but the record contains no further detail  
 about the problems or circumstances that led to termination in those cases.<sup>13</sup>

35 \_\_\_\_\_  
<sup>12</sup> Testimony that discloses the full names of the comparator employees discussed herein  
 can be found in the transcript at pages 66-70, 414-17, and 462-63.

35 \_\_\_\_\_  
<sup>13</sup> At trial, the Respondent offered a summary document, identified for the record as  
 Respondent's Exhibit 3, which purported to identify the reasons that the Respondent terminated  
 40 a number of employees. Counsel for the General Counsel and the Union objected to admission  
 of the summary. Since neither the General Counsel nor the Union had previously had an  
 opportunity to check the accuracy of the summary by comparing it to the underlying,  
 voluminous, records, I reserved ruling regarding the admission of Respondent's Exhibit 3 and  
 gave the General Counsel and Union 14 days to review the underlying documents and submit  
 45 their objections, if any, in writing. I stated that the Respondent would have 7 days to respond to  
 any such objections. The General Counsel and the Union both filed timely objections to  
 admission of the summary document, in which they described multiple, significant,  
 discrepancies between the information in that summary document and the information in the  
 underlying business records. The Respondent did not file a response to those objections within  
 50 the time allotted and later informed staff of the Division of Judges that the Respondent did not  
 wish to submit a response. Given the substantial nature of many of the un rebutted objections  
 made to the receipt of Respondent's Exhibit 3, I hereby sustain the objections to its admission  
 and reject the exhibit.

### G. The Complaint Allegations

5 The complaint alleges that the Respondent violated section 8(a)(1) of the Act: on about April 20, 2005, when Brink threatened to discharge Joe Farrell because Farrell was a union organizer; on about April 27, 2005, when Brink threatened an employee with unspecified reprisals for wearing clothing with union insignias; on about May 16, 2005, when Brink threatened that employees would be discharged if they signed union authorization cards; on 10 about May 16, 2005, when Brink created the impression that the Respondent was surveilling employees' union activities; on about May 16, 2005, when Brink threatened that the Respondent would sell part of its business if employees selected the Union to represent them; in mid-May 2005, when Brink interrogated an employee about his union activities and sympathies and those of other employees; and, on June 6, 2005, when Kuhlenbeck threatened employees that the 15 Respondent would not hire another union employee in order to ensure that the Respondent remained non-union. The complaint further alleges that the Respondent violated section 8(a)(3) and (1) by transferring Farrell on about April 25, 2005, and discharging him on about June 10, 2005, because he assisted the Union and engaged in concerted activities and to discourage employees from engaging in those activities.

### III. Analysis and Discussion

#### A. Alleged Violations of Section 8(a)(1)

##### 1. Threats

25 The General Counsel alleges a total of five unlawful threats -- four by Brink, and one by Kuhlenbeck. At all relevant times, Brink and Kuhlenbeck were both agents of the Respondent, and Brink was also a supervisor for purposes of Section 2(11) of the Act. The test to determine 30 if a statement violates Section 8(a)(1) is whether "under all the circumstances" the remark "reasonably tends to restrain, coerce, or interfere with the employee's rights guaranteed under the Act." *GM Electrics*, 323 NLRB 125, 127 (1997). "It is well established that this test does not depend on motive or the successful effect of the coercion." *Id.*

35 The first allegation of an unlawful threat is based on the following statement, which Brink made about Farrell during the week of April 17, 2005: "[P]ut him on my crew, I can run him off." Brink made this statement during a telephone conversation with T. Steele in the immediate presence and hearing of his supervisee, Fuller, and afterwards Brink turned to Fuller and explained that he had been speaking to T. Steele and that Farrell was a union organizer. The 40 Board has long held that an employer violates Section 8(a)(1) of the Act when it threatens to discharge or constructively discharge employees who are union activists. *Desert Toyota*, 346 NLRB No. 3, slip op. at 5 (2005) (threat of discharge unlawful); *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001), *enfd.* 309 F.3d 452 (7th Cir. 2002) (same); *Lyman Steel Company*, 249 NLRB 296, 301 (1980) (threat of constructive discharge unlawful); *Big Ben Shoe Store*, 172 45 NLRB 1523 (1968), *enfd.* as modified 440 F.2d 347 (7th Cir. 1971) (same); see also *Albertson Manufacturing Company*, 236 NLRB 663, 665 (1978) (employer violates Section 8(a)(1) when it threatens to constructively discharge union supporters by "living on their backs"). This is true regardless of whether the threat to discharge a union activist is communicated to the activist or, a here, to another employee. See *Desert Toyota*, 346 NLRB No. 3, slip op. at 1 (statement to 50 one employee linking another employee's discharge to the latter's support of the Union is coercive and a violation of Act). Nor does it matter that a portion of Brink's statement, while made in Fuller's presence and hearing, was actually made as part of a telephone conversation with T. Steele. See *Exterior Systems, Inc.*, 338 NLRB 677, 679 (2002) (threatening statement overheard by employee is violation of the Act); *Simpson Electric Company*, 250 NLRB 309

(1980) (remark made from one supervisor to another is unlawful when it was made in presence of employees and had a tendency to coerce those employees); see also *TPA, Inc.*, 337 NLRB 282, 283 (2001) (supervisor's statement that his boss had said to fire persons involved in work stoppage was an unlawful threat). Brink, by his statements, conveyed the message to Fuller that if an employee engaged in organizational activities, that employee could be constructively discharged or "run off." The coercive impact of that message was heightened when the Respondent discharged Farrell. Under all the circumstances, I conclude that Brink's statements would reasonably tend to coerce an employee's exercise of rights guaranteed by the Act.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(1) of the Act during the week of April 17, 2005, by threatening to force an employee off the job because he was a union organizer.

The second allegation of an unlawful threat is based on the statements that Hall testified Brink made on April 27, 2005, regarding Hall's decision to wear clothes with union slogans or insignias. According to Hall, Brink told him that the clothes were "going to cost [him]" and that if he wore such clothes "he might as well join them." Hall also testified that Brink dared him to "walk in the office and see how they appreciate . . . those clothes." For the reasons discussed above, I found that the record does not establish that Brink more likely than not made these statements. Therefore, I will recommend that the allegation regarding statements by Brink to Hall on April 27, 2005, be dismissed.

The third alleged threat is the statement that Brink made to Hall and Fuller in mid May 2005 that any employee who signed a union card "would be fired" and that "there was ways of finding" out which employees "did or did not" sign. An employee's decision to sign, or not sign, a union authorization card is clearly protected by the Act, and an employer violates Section 8(a)(1) by threatening to discharge employees who choose to sign. *Carroll & Carroll, Inc.*, 340 NLRB 1328, 1331-32 (2003); *Alaska Ship and Drydock, Inc.*, 340 NLRB 874, 880 (2003). I find that Brink's statement to employees, in mid-May 2005, that the Respondent would discharge anyone who signed a union card was a threat in violation of Section 8(a)(1).

The fourth alleged threat is Brink's statement to Fuller and Hall in May 2005 that before "T. Steele . . . was to go union," he would "sell his drill . . . and just build houses." An employer violates the Act when it threatens to respond to protected activity by closing part of its business. *John W. Hancock Jr., Inc.*, 337 NLRB 1223 (2002); *Air-Vac Industries, Inc.*, 259 NLRB 336, 342 (1981). Brink's statement that the Respondent would discontinue the phone tower portion of its operations if the employees selected the Union as their bargaining representative was a threat of partial closure and a violation of the Act. Such a partial closure would reasonably be expected to put the jobs of a significant number of employees in jeopardy. The Respondent has not argued that Brink's statement regarding partial closure was a lawful "prediction" that was "carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), and the evidence here would not support such a defense.

For the reasons discussed above, I find that Brink's statement to Fuller and Hall in May 2005 that the Respondent would partially close its business if the employees selected the Union as their bargaining representative was a threat in violation of Section 8(a)(1).

The last allegation of an unlawful threat is based on Kuhlenbeck's June 3 statements to Farrell and Hall. On that occasion, Farrell was asking for a week's unpaid leave of absence, and offered to find someone to fill in for him during that time. Kuhlenbeck answered that the Respondent was "not going to hire another union worker," and was a "non-union shop." An

employer's statement that it will not hire union supporters is an unlawful threat. *Commercial Erectors, Inc.*, 342 NLRB No. 94, slip op. at 3 fn. 4 (2004). I find that Kuhlenbeck's statement that the Respondent would refuse employment to union members was a threat in violation of Section 8(a)(1).

## 2. Impression of Surveillance

The General Counsel alleges that the Respondent unlawfully created the impression that employees' union activities were under surveillance when, in mid-May 2005, Brink told Hall and Fuller that employees who signed a union card "would be fired" and responded to Hall's statement that the Respondent would not know who signed, by stating that the Respondent had "ways of finding" out who "did or did not" sign. An employer violates the Act when it creates the impression among its employees that it has placed their union activity under surveillance. *Robert F. Kennedy Medical Center*, 332 NLRB 1536, 1539-40 (2000). The employer's conduct is evaluated from the perspective of the employees and is unlawful if the employees would reasonably conclude from the statement in question that their protected activities were being monitored. *Rogers Electric, Inc.*, 346 NLRB No. 53, slip op. at 2 (2006); *Robert F. Kennedy Medical Center*, 332 NLRB at 1540; *Tres Estrellas de Oro*, 329 NLRB 50, 50-51 (1999). Under these standards, the Board has found that an employer unlawfully creates the impression of surveillance when it tells employees that it can find out who signs a union authorization card. *Aquatech, Inc.*, 297 NLRB 711, 712-13 (1990), enf'd. 926 F.2d 538 (6th Cir. 1991) (statement that employer could learn which employees had signed authorization cards created impression of surveillance); *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) (employer violates the Act by giving employees the impression that it will surveil their activities to determine which employees sign union cards). In a representation proceeding, the names of employees who sign authorization cards are generally withheld from the employer, *National Telephone*, supra – a principle that Hall indicated he was aware of. Therefore, Brink's statement that the Respondent "had ways" of obtaining that information suggested that the Respondent was surveilling the employees' union activities. *Aquatech, Inc.*, supra.

I find that the Respondent violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance when, on May 2005, Brink told employees that the Respondent had ways of finding out whether they signed union cards.

## 3. Interrogation

The General Counsel alleges that the Respondent engaged in an unlawful interrogation when Brink asked Fuller if Farrell had given him the Union speech. Fuller answered that Farrell had talked to him about the subject in the past. An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Millard Refrigerated Services, Inc.*, 345 NLRB No. 95, slip op. at 4-5 (2005); *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enf'd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992). Relevant factors include, whether the interrogated employee was an open or active union supporter, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances against reprisal. *Millard Refrigerated*, supra; *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177-78 (1984), enf'd. 760 F.2d 1006 (9<sup>th</sup> Cir. 1985).

Considering all the relevant factors, I conclude that Brink engaged in a coercive interrogation of Fuller in mid-May 2005. Fuller was not shown to have chosen to make his views about union activity known. Indeed, the record does not disclose whether he had taken any position at all regarding such activity. Brink posed the question against the background of his own open hostility towards the union activity. At around the time the questioning took place, Brink had unlawfully threatened that employees who engaged in union activity would be subject to discharge and other retaliation. See *Millard Refrigerated Services*, 345 NLRB No. 95, slip op. at 5 (questioning unlawful where it occurred in a context that included other coercive conduct). The question that Brink posed related solely to union activities and was not shown to have any legitimate purpose. See *Structural Composite Industries*, 304 NLRB 729 (1991) (violation found where employee questioned was not an open union adherent and the questioning was directed solely at the employee's union activities). Brink posed the question out of the presence of other employees and at a jobsite where he had broad supervisory authority over Fuller. The Respondent does not claim that Brink offered reassurances that neither Fuller's, nor Farrell's, employment would be affected by Fuller's answer to the question about the union "speech." All of these factors weigh heavily in favor of finding that the questioning was coercive in violation of Section 8(a)(1).

Not all the evidence favors finding that the interrogation was coercive. The questioner was a working foreman with whom Fuller had daily contact – not T. Steele or some other high level official with whom Fuller had less experience interacting. Moreover, Brink did not pester Fuller with repeated, or particularly pointed, questions. Based on the record, I do not consider it implausible that Brink believed he was making small talk, but the inquiry does not turn on Brink's motives or on whether Fuller was, in fact, coerced by the interrogation. *Dlubak Corp.*, 307 NLRB 1138, 1146 (1992), enfd. 5 F.3d 1488 (3rd Cir. 1993) (Table) (The test of whether an interrogation is coercive does not turn on the Respondent's motive, gentleness, or on whether the coercion succeeded or failed.). After considering all of the circumstances discussed above, I conclude that the indicia that the interrogation was coercive outweigh those that the interrogation was benign in nature.

For the reasons stated above, I find that, in mid-May 2005, the Respondent violated section 8(a)(1) by coercively interrogating Fuller about employees' Union activities.

#### B. Reassignment of Farrell

An employer violates the Act by changing an employee's working conditions in order to deter or discourage union activities. *Banta Catalogue Group*, 342 NLRB No. 132, slip op. at 13 (2004). The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by transferring Farrell from a tower crew to a house crew because he had assisted the Union and engaged in concerted activities. In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer acted on the basis of union or protected activity. Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's actions were motivated, at least in part, by anti-union considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999).<sup>14</sup> If the General Counsel

<sup>14</sup> The Respondent contends that the General Counsel's initial burden under *Wright Line*  
Continued

establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, 330 NLRB at 1105. The Respondent cannot meet its *Wright Line* burden merely by showing that a legitimate reason factored into its decision. Rather, the Respondent must show that the legitimate reason would have resulted in the same action even in the absence of the employee's union and protected activities. *Monroe Manufacturing*, 323 NLRB 24, 27 (1997).

The General Counsel has met its initial burden in this case. By the time the Respondent transferred him, Farrell had engaged in protected activity on multiple occasions. In addition to identifying himself as a union organizer to all three other members of Anderson's crew, Farrell had given Barnewolt a copy of the Union contract, had told Barnewolt about the Union's healthcare plan, had discussed working conditions with Anderson, and had offered to provide Anderson with a copy of the Union's standard contract. Within a day or two of when Farrell began work, T. Steele and Oliver learned that he was an organizer. Not long after that, Farrell asked T. Steele if he could be excused from work on Friday, April 22, in order to attend union organizing school. Thus it is clear both that Farrell engaged in union activity during his first week with the Respondent, and that the Respondent was aware of that fact when it transferred him effective the following Monday.

The evidence demonstrates the presence of antiunion animus that was connected to the decision to transfer Farrell to Brink's crew. T. Steele testified that, in his view, he was entitled to discharge Farrell during the first week of employment because Farrell was a union organizer and had omitted that information from his application.<sup>15</sup> T. Steele did not immediately discharge Farrell, but he did act quickly to transfer Farrell to a new crew. That new crew was not just any one of the approximately seven operated by the Respondent, but rather the crew operated by Brink, a supervisor who was publicly and vehemently antiunion. Indeed, during a conversation with T. Steele shortly before the transfer, Brink had offered to force Farrell off the job.

In addition, the record shows that T. Steele was hostile to unions. As soon as he discovered that Farrell was a union organizer, T. Steele formed a negative impression of what to expect from Farrell. He also began to create a special document, not maintained for other employees, in which he reported negative comments that Brink made about Farrell's performance. It is clear that the purpose of this document was not to keep an accurate record of Farrell's performance, but to keep a *negative* record. At trial, T. Steele admitted that Brink initially told him that Farrell was doing a "nice job." However, the special document about Farrell's performance does not record that positive comment from Brink, or any other positive information about Farrell, but rather is limited to Brink's negative remarks. T. Steele transferred Farrell to Brink's crew, knowing that Brink had offered to force Farrell off the job. When T. Steele was asked at trial whether he had any anti-union animus or belief, he answered "no," but then,

was added to, or made heavier, by the Supreme Court's decision in *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994). The Board has already considered and rejected that argument, stating that *Greenwich Collieries* merely suggests a "change in phraseology" and "does not represent a substantive change in the *Wright Line* test." *Manno Elec., Inc.*, 321 NLRB 278, 283 (1996).

<sup>15</sup> This testimony is revealing regarding T. Steele's behavior in this case, but does not appear to be an accurate statement of the law. See *Winn-Dixie Stores*, 236 NLRB 1547 (1978) (employer cannot discharge employee for failing to reveal union status on employment application, even if employer discharged individuals who falsified applications in other respects); see also *American Residential Services of Indiana*, 345 NLRB No. 72, slip op. at 10 (2005) (omission on application is not material if it concerns only status as a union organizer).

unsolicited, delivered an angry diatribe -- one of the lengthiest continuous statements by any witness in this proceeding -- about the conduct of unions and union officials. Tr. 450-52.

5 The timing of Farrell's transfer provides further evidence that antiunion motivation played a part in the decision. See *North Carolina License Plate Agency*, 346 NLRB No. 30, slip op. at 2 (2006) ("[T]he timing of the discharges, immediately following the employees' threat to file a complaint, provides strong evidence of . . . animus."); *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000) (timing is an important factor in assessing motivation in cases alleging discriminatory discipline based on union or protected activity); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000) (same). Farrell applied for an operator position and was assigned to a tower crew on which he performed operator's work. Generally employees assigned to the Respondent's tower crews continue to work primarily on tower crews. However, almost immediately after discovering that Farrell was a union organizer, T. Steele decided to reassign Farrell to perform lower-skilled laborer's work on the house crew run by the very foreman who had offered to force Farrell off the job. During Farrell's remaining 7 weeks of employment, the Respondent assigned Farrell exclusively to Brink's house crew.

20 Since the General Counsel has made the required initial showing, the burden shifts to the Respondent under *Wright Line*, supra, to show that it would have taken the same action even in the absence of Farrell's protected activities. T. Steele testified that he transferred Farrell because the "crunch" on Anderson's crew was over, and he needed someone on Brink's crew with experience as a concrete finisher. In addition, Brink stated he had been asking for a crew member with a CDL, and that Farrell had a CDL. For the reasons discussed below, I conclude that Respondent has not substantiated the nondiscriminatory explanation it offers for Farrell's transfer.

30 First, the Respondent failed to show that a "crunch" on Anderson's team had ended at the time Farrell was transferred. To the contrary, the record shows that members of Anderson's crew continued to work long hours, often in excess of 60 hours a week, while Farrell was working far fewer hours in his new assignment with Brink's crew. Indeed, during one week on Brink's crew, Farrell worked a total of only 7.25 hours and during another week he worked a total of only 14.25 hours. Moreover, when Farrell was initially hired he was assigned to replace Peterson on Anderson's crew and performed operator's work. The Respondent never explains why, after the first week, it no longer needed Farrell to fill the vacancy left on Anderson's crew by Peterson's departure. Peterson did not return at the time Farrell was transferred, and no one else hired during that time period had applied to fill an operator opening. The Respondent has also failed to substantiate the suggestion that Farrell was reassigned because expertise with concrete work was lacking on Brink's team. Indeed, the record shows that Brink himself was a concrete specialist and that crew-member Fuller was skilled at concrete work. Regarding Farrell's ability to perform work for which a CDL was required, Brink said that he could not remember ever assigning such work to Farrell during the 7 weeks that Farrell was on his crew. The Respondent has failed to meet its burden of showing that, absent discrimination, it would have transferred Farrell from Anderson's to Brink's crew because the "crunch" on Anderson's team was over and because Farrell's particular skills were needed on Brink's crew.

50 The record leads me to conclude that the Respondent transferred Farrell to Brink's crew in hopes that the strongly antiunion Brink would manage to get rid of Farrell or impede his organizational efforts. In fact, after the transfer, Brink consistently assigned Farrell to perform laborer tasks instead of the more skilled operator work that Farrell was qualified to do, had applied to perform, and had initially been assigned to. Moreover, Farrell's work hours were cut dramatically on Brink's crew. Brink openly disparaged Farrell at work, nicknaming him "Union Joe," and making a crude comment about Farrell's union activity. During the same period, Brink

was unlawfully coercing other crew members with multiple threats, interrogation, and the impression of surveillance.

I find that the Respondent violated Section 8(a)(3) and (1) when, on about April 25, 2005, it discriminatorily transferred Farrell because of his activities on behalf of the Union.

### C. Discharge of Farrell

The Complaint alleges that the Respondent discharged Farrell because he assisted the Union and engaged in concerted activities. The General Counsel easily meets its initial burden *Wright Line* burden. It is undisputed that, prior to his discharge, Farrell actively engaged in union and other protected activity and that the Respondent was aware of that activity. As discussed above, the Respondent knew, even before the transfer, that Farrell was a union organizer. After the transfer, Brink observed Farrell wearing union paraphernalia at the Respondent's jobsites, displaying union slogans in the car that he drove to work, talking to a union official at a jobsite, and distributing union literature to employees. At least one employee – Fuller -- told Brink that Farrell had spoken to him about the Union, and Brink saw Hall wearing union paraphernalia that Farrell had provided. In addition, T. Steele was aware that Farrell had engaged in protected activity by complaining to OSHA about the Respondent's safety practices, and was contemplating making further such complaints. *United States Postal Service*, 338 NLRB 1052, 1057 (2003) (An employee engages in protected activity by making complaints to OSHA.); *Garage Management Corporation*, 334 NLRB 940, 951 (2001) (same).

The record demonstrates that Brink's antiunion animus played a part in the decision to terminate Farrell. T. Steele testified that, when he decided to discharge Farrell, he relied on Brink's reports about Farrell's performance. Brink's animus, and specifically his bias relative to Farrell, is amply demonstrated by the record. Before he ever met Farrell, Brink commented negatively about the new employee, remarking to one or more of his supervisees that it was a mistake to hire a union organizer. Brink stated that he could run Farrell off the job if Farrell was transferred to his crew. When Brink found out that Farrell was coming to his crew, he formed the impression that Farrell would not work out, even though the two had still not met. Once Farrell started working on Brink's crew, Brink made statements to supervisees in which he demeaned Farrell's union activities. As found above, Brink also violated the Act by threatening employees with adverse consequences for union activity, interrogating an employee about union discussions, and creating the impression that employees' organizational activities were under surveillance. Even T. Steele found it necessary to advise Brink to keep his opinions about unions to himself, and, at trial, Brink's demeanor became palpably hostile when he was testifying about unions. Brink's antiunion animus, and more particularly his hostility to the presence of a union organizer on the Respondent's workforce, could not be clearer. See, *supra*, footnote 2. Brink's animus unlawfully taints the Respondent's decision to discharge Farrell, even if one assumes that T. Steele's motives were not unlawful, since T. Steele based the decision to discharge Farrell largely on the reports he received from Brink. The Respondent's reliance on the tainted reports establishes a nexus between the discharge and unlawful discrimination, and satisfies the final element of the General Counsel's initial burden. *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000), *enfd.* 24 Fed. Appx. 1 (D.C. Cir. 2001).

By stating that the General Counsel's case regarding Farrell's discharge does not depend on a showing that T. Steele was himself motivated by unlawful discrimination, I do not mean to suggest that the record shows T. Steele was, in fact, acting without such motivation. To the contrary, I conclude that the evidence suggests antiunion animus played a part in T. Steele's action. T. Steele stated that, in his view, Farrell was subject to discharge as soon as it was discovered that Farrell was a union organizer and had not disclosed that information on his

application. T. Steele relied on the negative reports that Brink made regarding Farrell, even though T. Steele knew that Brink had offered to force Farrell off the job and had trouble keeping his views on unions to himself. Moreover, T. Steele relied on Brink's reports without giving Farrell an opportunity to respond or explain. Such failure would be an indicia of discriminatory intent even if T. Steele had not been aware of Brink's hostility towards union activity; but given that T. Steele was aware, his actions are hard to understand other than as evidence that he was not interested in determining whether the misconduct described by Brink had actually occurred. See *Government Employees (IBPO)*, 327 NLRB 676, 700-701 (1999), *enfd.* 205 F.3d 1324 (2d Cir. 1999) (Table) (failure to afford employee an opportunity to respond to allegations before imposing discipline "lends support to an inference of unlawful motivation and shows that [the employer] was not truly interested in determining whether misconduct had actually occurred"); *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998), *enfd.* 201 F.3d 592 (5<sup>th</sup> Cir. 2000) ("The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are clear indicia of discriminatory intent."). Moreover, as discussed above, the evidence shows both that T. Steele bore antiunion animus, and that he had been working to assemble a negative, one-sided, paper trail regarding Farrell's performance.

The timing of Farrell's termination also lends support to the view that his union and other protected activity motivated the Respondent's decision to terminate him. See *North Carolina License Plate Agency*, 346 NLRB No. 30, slip op. at 2; *Detroit Paneling Systems*, 330 NLRB at 1170; *Bethlehem Temple Learning*, 330 NLRB at 1178. Farrell was terminated on June 10, only one day after informing T. Steele that he had brought various safety concerns to the attention of OSHA. T. Steele discharged Farrell at the June 10 meeting Farrell had requested in order to describe additional safety concerns he said he might raise with OSHA. Farrell's contacts with OSHA were protected activity. *United States Postal Service*, 338 NLRB at 1057; *Garage Management*, 334 NLRB at 951. At the same meeting, Farrell took one of the bolder steps of the union campaign – presenting T. Steele with the Union's standard memorandum of agreement and asking him, face-to-face, if he would sign it. T. Steele discharged Farrell immediately after the parties finished discussing Farrell's safety concerns and the union contract. The evidence does not show that the decision to carry out Farrell's discharge on June 10 had been made prior to that day, or even prior to Farrell's presentation. Indeed the evidence suggests the contrary -- showing that, before June 10, T. Steele had never told Farrell about any of the performance problems upon which the discharge was supposedly based. Moreover, if T. Steele had previously decided to discharge Farrell effective June 10 for legitimate reasons, one would have expected T. Steele to initiate a meeting for the purpose of communicating that decision, not wait for the meeting that Farrell initiated regarding safety concerns and the union contract. At any rate, the Respondent did not show that Farrell had any specific performance problems during the few days immediately preceding his discharge that would indicate that poor performance, and not protected activity, account for the suspicious timing of the discharge.

In reaching the conclusion that the General Counsel has shown that antiunion motivation played a part in Farrell's discharge, I considered the evidence that, prior to Farrell's arrival, the Respondent had often knowingly hired union members and allowed them to work unharrassed. However, prior to Farrell's arrival, none of the union members hired by the Respondent engaged in an effort to convince the Respondent's employees to organize for union representation. As the Board has recognized, an employer's tolerance of an employee's union affiliation does not show that it will not react unlawfully to a present effort to organize its employees. *H.B. Zachry*, 332 NLRB 1178, 1183 (2000); see also *Zurn/N.E.P.C.O.*, 345 NLRB No. 1, slip op. at 9 (2005) ("That the [employer] hired several union electricians does not negate the strong evidence that the [employer] discriminated against [another applicant] because of his union status.").

Since the General Counsel has made the required initial showing, the burden shifts to the Respondent under *Wright Line*, supra, to show that it would have taken the same action even in the absence of Farrell's protected activities. The Respondent asserts that Farrell was discharged for essentially two reasons: (1) he was slowing down the pace of his own work and that of the crew, and (2) his attendance was unacceptable. I conclude that the Respondent has failed to meet its burden of showing that, absent discrimination, T. Steele would have discharged Farrell for the stated reasons. To support the claim that the discharge was based on Farrell's pace, the Respondent relied primarily on the testimony of Brink. As stated above, I did not consider Brink a very credible witness, and his testimony about Farrell's performance is particularly suspect given the evidence of his personal bias and declared willingness to force Farrell off the job. Brink's testimony regarding Farrell's alleged deficiencies is further undermined by his lack of precision and the insubstantial nature of the few specific instances he was able to recall. Brink could not describe or quantify the slowing in Farrell's work pace other than to say it was "very apparent . . . to everyone." When pressed for examples, he presented only two. In one, Farrell was talking to a union official during work time. Brink told him that this was not permissible and Farrell never did it again. In the second episode, Farrell was talking on his cell phone during work time. This time, too, Farrell never engaged in the conduct again after Brink told him to stop.

The Respondent attempts to use the testimonies of J. Kuhlenbeck and L. Steele to buttress its claim that it would have discharged Farrell based on poor performance even absent the protected activities. Each of those witnesses testified about an additional example of allegedly inadequate performance by Farrell – J. Kuhlenbeck about an occasion when his truck was damaged and required repair, and L. Steele about Farrell's and Hall's performance when concrete was being pumped into the walls of a house. Their testimony regarding those occasions is of limited relevance since both witnesses conceded that they did not tell T. Steele, or any other official of the Respondent, about the incidents. Thus it is hard to see how J. Kuhlenbeck's and L. Steele's perceptions regarding Farrell's performance on those occasions could have led T. Steele to discharge Farrell absent the protected activity. At best, their testimony about those occasions might lend some support to Brink's claim that the Farrell's poor performance was "very apparent . . . to everyone." However, I conclude that their testimony regarding those episodes should not be afforded even that weight. As discussed earlier, both J. Kuhlenbeck and L. Steele were biased witnesses who slanted their accounts in an effort to favor the Respondent. The two examples of Farrell's inadequate performance that they testified about on direct examination were revealed, on cross-examination, to be exaggeration bordering on fabrication.

The Respondent also fails to substantiate the claim that Farrell's attendance record would have led the Respondent to discharge him in the absence of the protected activity. As stated above, the evidence leaves significant questions about whether attendance was even considered at the time that Farrell was discharged. The Respondent did not mention attendance to Farrell when it explained the basis for his discharge to him on June 10, and Kuhlenbeck -- the Respondent's human resources official -- testified that her understanding was that attendance played no part in the termination. T. Steele's trial testimony regarding the subject was tellingly inconsistent. At first he claimed that Farrell was terminated, in part, for "missing frequently," but when confronted with evidence that the Respondent retained employees who were absent more frequently than Farrell, T. Steele changed his story and stated that the problem was not the frequency of Farrell's absences, but that Farrell picked days when the Respondent needed him most. Then, when discussing Farrell's missed days, T. Steele admitted that there was no work for Farrell to perform when he was absent on April 22.

The Respondent's contention that Farrell would have been discharged for poor attendance is also not substantiated by the evidence regarding comparator employees. To the contrary, as discussed above, that evidence showed that the Respondent retained a number of new employees who were not union organizers even though they had attendance records that were worse, and in some cases significantly worse, than Farrell's. When employees who were not involved in protected activity are given lesser discipline for worse conduct it suggests an improper motive. *Detroit Newspapers*, 342 NLRB No. 125, slip op. at 3 (2004), remanded 435 F.3d 302 (D.C. Cir. 2006); *Aldworth Co., Inc.*, 338 NLRB 137, 209 (2002); *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998). Moreover, the record leaves the definite impression that the Respondent was attempting to trump up evidence that Farrell's attendance was unacceptable. As discussed earlier, Brink issued a verbal reprimand to Farrell that was putatively based on Farrell's failure to give the 24-hour, pre-absence, notice that was required by the handbook policy. However, the evidence revealed that the policy in the handbook only required 1 hour's notice and that Farrell had given approximately 12 hours' notice. Moreover, Brink had never disciplined any other employee who gave notice, but did not do so 24 hours in advance. In a similar vein, the record shows that more than 2 weeks after the fact, the Respondent inserted a negative notation into Farrell's personnel file regarding his absence on May 16,<sup>16</sup> even though Farrell had obtained prior permission from Brink to be absent that day to attend a funeral. I recognize, that it is not the Board's role to substitute its judgment about appropriate discipline for that of the employer, but it is the Board's responsibility "to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts." *Desert Toyota*, 346 NLRB No. 3, slip op. at 3-4. Based on the record evidence, I conclude that, in this case, the reasons the Respondent gives for terminating Farrell were not its true reasons, but mere pretexts for unlawful discrimination.

The Respondent presented evidence that its workforce had a fair amount of turnover and, in particular, that the three employees hired at approximately the same time as Farrell had all been terminated as of the hearing. However, the Respondent presented no further detail regarding the timing, bases, or other circumstances surrounding those terminations. Without such detail, the evidence that other employees were discharged does not shed meaningful light on the question of whether the Respondent would have discharged an employee who was comparable to Farrell, but who did not engage in protected activities.

For the reasons discussed above, I conclude that the Respondent violated section 8(a)(3) and (1) of the Act by discriminatorily discharging Farrell because he assisted the Union and engaged in concerted activities.

#### Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent interfered with employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act: during the week of April 17, 2005, by threatening to force an employee off the job because he was a union organizer; in mid-May 2005, by threatening to discharge any employee who signed a union card; in May 2005, by threatening to partially close

---

<sup>16</sup> The personnel file actually reports this as May 15, a Sunday, but it is clear from the record that it referred to Farrell's absence on May 16.

its business if employees selected the Union as their bargaining representative; on June 3, 2005, by threatening to refuse employment to individuals because they are union members; in May 2005, by creating the impression that employees' union activities were under surveillance; and, in mid-May 2005, by coercively interrogating an employee about union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act: on about April 25, 2005, by discriminatorily reassigning Joe Farrell because he assisted the Union; and, on June 10, 2005, by discriminatorily discharging Joe Farrell because he assisted the Union and engaged in concerted activities.

### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In addition to the usual cease-and-desist order and other affirmative relief, I recommend that the Respondent be ordered to offer Joe Farrell full reinstatement to a position as an operator on a tower crew and make him whole for any loss of earnings and other benefits he suffered as a result of his unlawful reassignment and termination. The backpay is to be computed in accordance with *F.W. Woolworth, Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.<sup>17</sup>

### ORDER

The Respondent, T. Steele Construction, Inc., Rock Island, Illinois, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from

(a) Threatening to force employees off the job because they are union organizers or engage in union activities.

(b) Threatening to discharge employees if they sign union authorization cards.

(c) Threatening to partially close its business if employees select a union as their collective bargaining representative.

(d) Threatening to refuse employment to individuals because of their union membership.

(e) Creating the impression that employees' union activities are under surveillance.

(f) Coercively interrogating employees about union activities.

---

<sup>17</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Reassigning any employee because he or she assists a union and/or engages in concerted activities.

(h) Discharging any employee because he or she assists a union and/or engages in concerted activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Joe Farrell full reinstatement to a position performing work as an operator on a phone tower crew, without prejudice to any rights or privileges previously enjoyed.

(b) Make Joe Farrell whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Joe Farrell, and within 3 days thereafter, notify him that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Rock Island, Illinois, copies of the attached notice marked "Appendix."<sup>18</sup> Copies of the notice, on forms provided by the Regional Director for Subregion 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 18, 2005.

---

<sup>18</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

---

PAUL BOGAS  
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT threaten to force you off the job because you are a union organizer or engage in union activities.

WE WILL NOT threaten that you will be discharged if you sign a union authorization card.

WE WILL NOT threaten that we will close part of our business if you select the union as your collective bargaining representative.

WE WILL NOT threaten to refuse to employ individuals because they are union members.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT coercively interrogate you about union or other protected activities.

WE WILL NOT reassign, discharge, or otherwise discriminate against you for supporting a union, participating in union activities, or engaging in other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Joe Farrell full reinstatement to a position performing work as an operator on a phone tower crew, without prejudice to any rights or privileges previously enjoyed.

WE WILL make Joe Farrell whole for any loss of earnings and other benefits he suffered as a result of our unlawful reassignment and discharge of him, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Joe Farrell's unlawful discharge, and within 3 days thereafter notify him that this has been done and that the discharge will not be used against him in any way.

T. STEELE CONSTRUCTION, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

300 Hamilton Boulevard, Suite 200

Peoria, Illinois 61602-1246

Hours: 8:30 a.m. to 5 p.m.

309-671-7080

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-309-671-7085.